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FBI Law Enforcement Bulletin

Features

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On the Spot
Testifying in Court for Law Enforcement Officers

By LAURENCE MILLER, Ph.D.

Many law enforcement officers cite testifying in court as one of the most stressful aspects of their job, perceiving it as an adversarial system where defense attorneys may skewer them during aggressive cross-examination. While many patrol officers will testify only a few times in their careers, for others, such as traffic cops and criminal investigators, court testimony constitutes a regular part of their work routine. As witnesses, law enforcement officers must ensure that the facts they present communicate the complete story and that their delivery of those facts makes their testimony clear and credible.[1]

Types of Witnesses and Testimony

A fact witness has personal knowledge of events pertaining to a case and can only testify to things he personally has observed (e.g., "Fred told me he was mad at his boss." "I saw Fred reach for something in his glove compartment.").[2] He may not offer opinions (e.g., "Based on Fred's behavioral profile and history of violence, he is likely to seek revenge for even small slights."), such as those expected from an expert witness retained either by the prosecution or defense or appointed by the court to make statements about aspects of the case. Experts only offer opinions that may assist the judge or jury in understanding specialized

> ***"Police officers may find that their testimonies sometimes straddle the domains of fact and expert witness."***

Dr. Miller is a clinical, forensic, and police psychologist in Boca Raton, Florida.

technical knowledge that, otherwise, would be beyond their expertise (e.g., typically, the role of credentialed specialists in forensic-related fields, such as a medical examiner, crime lab expert, firearms specialist, or forensic psychologist). Although experts usually are allowed more leeway in testimony than fact witnesses, the court carefully evaluates the content of their testimony for admissibility.

Police officers may find that their testimonies sometimes straddle the domains of fact and expert witness. For example, an officer may be queried about what he did and what the defendant did (like a fact witness) and then be asked to state an opinion (like an expert witness). Or, he may state an opinion that the opposing attorney challenges, and the judge must decide whether or not to admit it in the record.

Attorney: Officer Jackson, can you tell us how you first approached the defendant while undercover?

Officer: Well, actually, he first approached me.

Attorney: What do you mean?

Officer: I was undercover as a local high school student, and the defendant came over and asked me if I "needed directions."

Attorney: And what did you answer?

Officer: That I was "going uptown."

Attorney: Can you explain to this court what that conversation means?

Officer: Well, in that neighborhood, "needing directions" means that you want to buy drugs, and "uptown" is coke or sometimes crystal meth—some kind of stimulant drug.

Attorney: But, at no time did the defendant actually ask you if you, quote-unquote, "wanted to buy drugs," did he?

Officer: Not in those words.

Attorney: So, you don't know for sure if he really intended to sell you drugs or was just trying to help out.

Officer: Of course I knew. That's the language they use.

Attorney: Officer Jackson, are you an expert in linguistics?

Officer: No, but I'm an expert on that neighborhood—I've worked undercover there for 5 years.

Testimony Preparation

Officers should understand the importance of proper record keeping and always strive to develop a well-organized, standardized, and readable style for reports. This will help them clarify, organize, and remember particular points if the case goes to trial. Officers can draw pictures to help their description and to jog their memories in court. They can supplement standard forms and checklists with their own words and illustrations to help explain a potentially confusing scenario.

Officers should review their cases several times—the more thoroughly they know the facts and theories about the case, the easier they can answer questions without relying on rote memorization. Their knowledge and recollection will be an organic, holistic, automatic process against cross-examination. An officer should meet with the prosecutor several times to review testimony. Together, they should clarify the officer's testimony, agree how the officer should best express himself, and discuss what the prosecution and defense sides will ask.

Officers should mentally rehearse for their case, going over the facts and testimony out loud to themselves while standing in front of a mirror or driving. If unfamiliar with delivering testimony, they should visit a courtroom and observe other trials in progress. But, even for the seasoned witness, no substitute exists for adequate preparation. Many veteran experts have let their overconfidence lead to loose ends, inadvertently hindering their testimony.

On the Stand

Certainly, most important aspects of courtroom demeanor cannot be programmed; witnesses bring their own unique style to the stand. Nevertheless, officers productively can apply a few principles of effective testimony.[3] They should have a general attitude of confidence but not cockiness. To the average juror, police officers convey an air of authority and respect; therefore, they should maintain composure and dignity at all times and remember that their job is only to present the facts and evidence.

Body language is important. Officers always should sit up straight. If a microphone is present, officers should sit close enough to not have to lean over every time they speak. They should keep presentation materials neatly organized in front of them to find documents and exhibits when needed. While testifying, officers should look at the attorney questioning them and then switch eye contact to the jury when answering. They should establish a connection with the jurors because they tend to find witnesses who look straight at them more credible. Officers should remain open, friendly, and dignified and speak clearly, slowly, and concisely. They should keep sentences short and to the point and maintain a steady voice tone, as in a normal conversation. Officers' general attitude toward the jury should convey a sense of collegial respect (i.e., they are there to present the facts to a group of mature adults who will make the right decision).

Officers should carefully listen to each question before they respond. If they do not fully understand the question, they should ask the attorney to repeat or rephrase it, taking a couple of seconds to compose their thoughts, if necessary. If an officer does not know the answer to the question, he should state plainly, "I don't know."

Checklist for Testifying in Court

- Understand the different types of witnesses and testimonies.
- Prepare effectively by reviewing the case several times.
- Display appropriate verbal and nonverbal skills.
- Be honest, clear, and concise in all responses.
- Maintain dignity and decorum at all times.

He should not try to bluff his way out of a difficult question. Officers should not become defensive, and, above all, they must be honest. If anyone in the courtroom detects even a somewhat dishonest answer, especially from police officers, it can ruin the rest of their entire testimony.

Attorneys may phrase questions in a way that constrains answers in a particular direction. If officers feel they cannot honestly answer the question with a simple yes or no, they should respond: "Sir, if I limit my answer to yes or no, I will not be able to give factual testimony. Is that what you wish me to do?" Sometimes, the attorney voluntarily will reword the question. But, if he presses for a yes or no answer, at that point, either the other attorney will voice an objection or the judge will intervene. The latter may instruct the cross-examining attorney to allow the officer more leeway in responding, to rephrase his question, or to simply order the officer to answer the question as asked.

Additionally, officers should not preface answers with such phrases as "I believe...."; "I estimate...."; "To the best of my knowledge/recollection...."; "As far as I know...."; "What I was able to piece together...."; or "I'm pretty sure that...." Instead, officers should be as definite about their answers as possible or honestly state that this particular piece of testimony may not be a clear perception or recollection, but they should remain firm about what they *are* sure about.

In general, officers should try not to answer beyond the question. For example, if the attorney asks an officer to phrase answers in precise measurements not relevant or that the officer cannot accurately recall, officers should not speculate unless actually asked to do so.

> ***Attorney:*** Officer Jackson, you say you saw the defendant take two drug vials out of his jacket pocket. How far away from the defendant were you when you made this observation?
>
> ***Officer:*** About half a block away.
>
> ***Attorney:*** How many feet away would that be?
>
> ***Officer:*** I don't know.
>
> ***Attorney:*** Surely, officer, you can estimate the distance. Was it a hundred feet? Two hundred? Fifty? Ten?
>
> ***Officer:*** I really can't accurately estimate the number of feet. But, on that block, between myself and the defendant, there was a liquor store, a dry cleaner, and the front steps of a post office. The defendant was standing right next to the first step, close enough to observe his hand movements clearly.

The opposing attorney may ask an officer to estimate something reasonable, like the amount of time that passed (which most people can roughly gauge in terms of minutes or

hours) and then switch to other, less quantifiable, topics while the officer is still in the estimative mind-set. Now, everything the officer says becomes an estimate or something recalled to the best of the officer's knowledge. Later, in summation, the opposing counsel may state something like, "And Officer Jackson really hasn't described anything solid has he? Everything is an estimate, a guess, an inference. Ladies and gentlemen of the jury, is a loose collection of 'maybes' and 'I guess so's' sufficient evidence to convict a man and deprive him of his freedom?" Officers should try to emphasize that the ambiguity lies with the subject matter, not with their own perceptions and interpretations.

> ***Attorney:*** Officer, could you see how much cocaine the defendant had in the plastic bag? Could you see exactly how many ounces it was?
>
> ***Officer:*** Exactly how many ounces, no.
>
> ***Attorney:*** So, you can only guess what the amount was, is that correct?
>
> ***Officer:*** Obviously, I couldn't measure the cocaine in the suspect's hands. But, I could clearly see that he was holding an 8-ounce plastic bag and that the amount of powder in the bag almost filled it. So, that's got to be at least 6 or 7 ounces, well above the 2-ounce limit for felony possession and sale.

An Officer as the Defendant

If an officer becomes the defendant in a criminal or civil case, he may have to testify in court; the general principles of testimony still apply. But, this time, the personal stakes are higher and the rules a little different.[4] Now, the officer's role switches from dispassionate fact or expert witness to the person on trial. The officer may not be afforded the same deference and respect he received as a witness. Accordingly, the officer's demeanor, while still professional, should shade slightly more to the deferential and humble side with an attitude conveying confidence in putting his fate in the jury's hands and trusting them to do the right thing. Otherwise, the principles of effective court testimony are the same.

> ***Officers should... strive to develop a well-organized, standardized, and readable style for reports.***

A special issue relates more directly to the role of psychologists in the legal process. Officers criminally charged or civilly sued may have undergone psychological counseling, stress debriefing, a psychological fitness-for-duty evaluation, or other mental health services. This raises issues of confidentiality and admissibility of psychological records. In the author's experience, rarely do courts order the release of confidential mental health records, except under the most extreme circumstances. Still, because this may happen, officers undergoing any kind of legal charge should feel free to tell the psychologist about their feelings, symptoms, and efforts to cope with their ordeal. But, if an officer is not sure whether to reveal a piece of factual case evidence, *they should ask their lawyer first*. If the lawyer advises the officer not to tell the psychologist, the officer should comply. Psychologists still can administer effective psychotherapy without knowing every technical detail. Accordingly, neither the officer nor the psychologist will be put in the position of revealing a secret.[5]

Psychologists should be aware, however, that this is not a legal panacea because they may be subpoenaed to testify, and the line of questioning can

be skillfully used to make it look like the clinician is hiding something or, at least, that he is incompetent.

Attorney: Dr. Lopez, during the course of your psychological treatment of Officer Jackson, did he render to you a history of the events he is charged with and a description of what took place?

Psychologist: He pretty much told me what's in the record regarding the circumstances of the charges against him.

Attorney: Did he tell you how many times he struck Mr. Williams after he had been handcuffed and restrained?

Psychologist: No.

Attorney: Isn't that something you would want to know when taking a clinical history from Officer Jackson?

Psychologist: The exact number of strikes isn't really an important detail at that point.

Attorney: Did he tell you how he felt during his struggle with Mr. Williams? Was he mad? Frightened? Enraged? Was he looking for revenge?

[At this point, the officer's attorney will probably object.]

Psychologist: We really didn't discuss that in our first session. I was more concerned with his mental status at that time.

Attorney: And, how was he feeling, doctor? Did he express remorse? Was he sorry for what he'd done? Or, was he glad Mr. Williams got what he deserved?

[Probably another objection.]

> ***Body language is important.***

Psychologist: He was generally upset about the injuries Mr. Williams received as that was not his intention. As it already has been well-documented in the record, Officer Jackson maintains that the injuries were accidental, sustained while Mr. Williams was violently resisting arrest in a state of extreme intoxication.

Attorney: And that's it, doctor? That's all you got from Officer Jackson in that first session? You mean to say that you spent an hour with Officer Jackson, and all he told you was what was in his initial statement?

Psychologist: I believe I just answered the questions you asked me.

In such cross-examinations from aggressive opposing counsel, officers should try to maintain as much composure and dignity as possible. An important part of trial testimony is the impression an officer makes on the jury by his demeanor, language, and grace under pressure. Therefore, officers should avoid either being cowed into submission or baited into an angry overreaction. Consistently reviewing testimony before the trial can help officers anticipate challenges and become comfortable with the substance of the case.

Conclusion

Most citizens, including jurors, want to believe that the people they place their trust in—such as doctors, police officers, and public officials—have their best welfare in mind. Many people give law enforcement officers the benefit of a doubt if they offer a credible reason to do so. In contrast, if officers cross jurors through dishonesty or flagrant disrespect, jurors may reciprocate especially hard for betraying that trust. Law enforcement agencies should ensure that officers prepare carefully for their cases, present clear and honest

testimonies, and maintain dignity and decorum. As a result, officers may find that testifying in court need not rank among the most stressful aspects of their duties. ✦

Endnotes

[1] This article provides some practical recommendations for testifying in court based on a survey of literature and the experiences of the author's law enforcement colleagues, as well as his own as an expert witness in forensic psychology. For more information, see the author's recent work, *Practical Police Psychology: Stress Management and Crisis Intervention for Law Enforcement* (Springfield, IL: Charles C. Thomas, 2006).

[2] The author employs masculine pronouns throughout the article for illustrative purposes.

[3] W. Anderson, D. Swenson, and D. Clay, *Stress Management for Law Enforcement Officers* (Englewood Cliffs, NJ: Prentice Hall, 1995); M. Mogil, "Maximizing Your Courtroom Testimony," *FBI Law Enforcement Bulletin*, May 1989, 7-9; A.J. Posey and L.S. Wrightsman, *Trial Consulting* (New York, NY: Oxford University Press, 2005); D.E. Vinson and D.S. Davis, *Jury Persuasion: Psychological Strategies and Trial Techniques* (Little Falls, NJ: Glasser Legalworks, 1993); and Joe Navarro, "Testifying in the Theater of the Courtroom," *FBI Law Enforcement Bulletin*, September 2004, 26-30.

[4] D. Chambers, "Police-Defendants: Surviving a Civil Suit," *FBI Law Enforcement Bulletin,* March 1996, 34-39; D. Griffith, "On the Hook," *Police,* September 2005, 42-51; and L. Miller, *Practical Police Psychology: Stress Management and Crisis Intervention for Law Enforcement* (Springfield, IL: Charles C. Thomas, 2006).

[5] The author bases these conclusions on his experiences as an expert witness in forensic psychology.

FBI Law Enforcement Bulletin Author Guidelines

Length: Manuscripts should contain 2,000 to 3,500 words (8 to 14 pages, double-spaced) for feature articles and 1,200 to 2,000 words (5 to 8 pages, double-spaced) for specialized departments, such as Police Practice.

Format: Authors should submit three copies of their articles typed and double-spaced on 8 ½- by 11-inch white paper with all pages numbered, along with an electronic version saved on computer disk, or e-mail them.

Criteria: The *Bulletin* judges articles on relevance to the audience, factual accuracy, analysis of the information, structure and logical flow, style and ease of reading, and length. It generally does not publish articles on similar topics within a 12-month period or accept those previously published or currently under consideration by other magazines. Because it is a government publication, the *Bulletin* cannot accept articles that advertise a product or service. To ensure that their writing style meets the *Bulletin's* requirements, authors should study several issues of the magazine and contact the staff or access *http://www.fbi.gov/publications/leb/leb.htm* for the expanded author guidelines, which contain additional specifications, detailed examples, and effective writing techniques. The *Bulletin* will advise authors of acceptance or rejection but cannot guarantee a publication date for accepted articles, which the staff edits for length, clarity, format, and style.

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ViCAP Alert

Homicide Victim

On August 23, 1994, approximately 4 weeks after Beth Ellen Vinson, a 17-year-old female, left her home in Greensboro, North Carolina, and went to Raleigh, North Carolina, to work and save enough money to get to New York, her body was found. Ms. Vinson's body had been covered with cardboard and left between two warehouses on Wicker Road. Ms. Vinson worked for an escort service and was last seen at 2:30 a.m. on August 16, 1994, when she left her apartment to meet a client. At 5:30 a.m., her 1990 white four-door Mazda 626 was found at the entrance of a car dealership on Capital Boulevard.

Continuing investigation of this homicide determined that Ms. Vinson was in possession of four pieces of jewelry and a multicolored cloth purse the morning of her homicide. These items never have been recovered. A medical examination disclosed that Ms. Vinson had been stabbed in excess of 15 times.

Alert to Law Enforcement

Law enforcement agencies should bring this information to the attention of all crime analysis and cold case units, as well as to officers investigating crimes against persons. Any agency that believes this incident is similar to one of their cases should contact Detective Jacqueline Taylor, Raleigh Police Department, at 919-890-3920 or jacqueline.taylor@ci.raleigh.nc.us; or Crime Analyst Glen W. Wildey, Jr., of the FBI's Violent Criminal Apprehension Program (ViCAP) Unit at 703-632-4166 or gwildeyj@leo.gov. ✦

Missing Property

Spoon Ring
Made from sterling silver spoon (1970), Gorham brand, Chantilly pattern, size 6

Mother's Ring
14k gold, 1 amethyst stone on the outside, 1 garnet stone in the center, size 6

Mood Ring
Silver (faux), white stone that gets darker with body heat, size 6

Amethyst Ring
Ladies yellow gold, amethyst (purple) stone, 2 diamond chips, stackable-type ring, size 6

Pull-String Shoulder Bag
Cloth material, burgundy, burnt orange, and brown, 6" by 4 ½" tall, black shoulder straps, figure of a cowboy woven into the material, zipper on the top with leather strap

Communication Lessons from U.S. Civil War Leaders

"Leadership is the process of persuasion or example…."

John Gardner, *On Leadership*

Without effective communication, there *is* no persuasion or example. None of what leaders dream or seek to accomplish can occur. Leaders provide direction, inspiration, and vision. Their verbal and nonverbal communication impacts the success or failure of these tasks.

General Robert E. Lee showed that even great leaders may have communication failure if they present an unclear message. He sent a message to General Richard Ewell at the end of the first day of the Battle of Gettysburg. As the Federal troops retreated, Lee advised, "It is only necessary to push those people to get possession of those heights. Of course, I do not know his situation…but I do want him to take that hill, if he thinks practicable."[1] Ewell did not act. That gave the Federal troops time to reinforce. Lee wanted the hill taken, but his use of *"*if he thinks practicable*"* diminished his true intent. Leaders must remain clear and unambiguous when expecting specific action.

At the Second Battle of Manassas, General John Pope sent a dispatch to his officers and soldiers. He wrote, "I hear constantly of…lines of retreat…. Let us discard such ideas. Let us study the probable lines of retreat of our opponents and leave our own to take care of themselves. Let us look before us, and not behind. Success and glory are in the advance, disaster and shame lurk in the rear." While potentially inspiring, one could argue that the tone devastated morale on the eve of a significant battle. Timing and tone of the message can be everything.

At the First Battle of Manassas, the Union army may have contributed to its defeat by failing to use a technical tool—the flag corps. While leaders of both armies knew the value of communication through flag signaling, only the Confederate army took advantage of this resource. Thus, they were able to relocate forces to defend themselves against attack. Leaders must constantly evaluate the effectiveness of their communication. They will enhance the potential for success by ensuring the clarity of their desired outcome and using the appropriate tools for conveyance. ✦

Endnotes

[1] Michael Shaara, *The Killer Angels* (New York; Random House, 2004).

Daniel W. Ford, J.D., division chief, human resources, for the Orange County, Florida, Sheriff's Office and leadership fellow with the FBI's Leadership Development Institute, prepared Leadership Spotlight.

Notable Speech

The Courage to Teach

By Robert W. Peetz, M.C.J.

Sometime ago, a friend gave me the book *The Courage to Teach*. She assured me that it was excellent and would provide insight into the art of teaching. I read it and found that it contained many truths about education. As I thought about addressing you, I considered many topic possibilities. Then, it came to me—much of the book, with a few changes, is as applicable to policing as teaching.

You are about to enter the world of crime and criminal justice. For months, you have studied a variety of subjects someone, somewhere, deemed necessary and important to police work. You have enjoyed successes and faced and overcome failure. You have endured hours of learning from experienced teachers, and you've learned that basketball, like defensive tactics and the mechanics of arrest and search, is a full-contact sport. Perhaps, each of you, as well as your families, have wondered from time to time if it was worth all the hard work and pain to get a job. Only time will answer that age-old question. Now, I want to pose, and perhaps answer, some questions.

What Is a Good Police Officer?

Good policing requires that we understand both what it is and why we do it. Good police officers create a sense of well-being in their communities. They protect everyone—citizens, victims, and criminals—and they serve the good of the community, not themselves. They are active in community affairs not because they have to, but because they want to get involved. Good policing comes from good people. Good police officers are mentors for others, officers and citizens, and they set positive examples. The mark of good police officers may not be what they do but what they are remembered for after they have moved on. Good police officers are good teachers; they think, analyze, and listen; they are objective; they instill confidence in others; and they leave behind a perception that they are knowledgeable and, above all, fair. Good policing is all about doing the right thing at the right time because it is the right thing to do.

What Have You Learned?

You have leaned the basics—criminal, civil, and procedural law; traffic enforcement; accident investigation; patrol tactics; and a wide range of other subjects taught at the academy. You've learned that you must keep yourself mentally alert, physically fit, and morally straight, always prepared for the unknown situation that lies ahead. But, I hope you also have learned one of the basic truths about police work—there is no place for racism, bigotry, hate, prejudice, and discrimination. You now must take that knowledge and do two things: become a good cop and learn to avoid the evils of corruption and cynicism. Do not hide behind the "blue curtain." Do not fall prey to the old belief that new officers have no experience worth having, no voice worth speaking, no future of any note, and no significant role to play. Each of you are valuable assets to your future employer, your community, and yourself. Do not be afraid to be a good cop.

Mr. Peetz, a criminal justice professor at Midland College in Midland, Texas, delivered this speech at the graduation ceremony for the 75th session of the Odessa College Police Academy in Pecos, Texas.

Where Does It All End?

It doesn't end. The best doctors, lawyers, teachers, and cops *never* stop learning. Today, you complete the academy and move into the workplace. This is the beginning, the alpha, not the end. You must develop a zeal for lifelong learning and never let it diminish. Master your profession. Study the law, work crossword puzzles, take college courses, read books, watch educational TV programs and the news. *Never* stop learning. You have been taking tests for nearly 9 months, but you have not yet been tested. You will be tested, time and time again. Each contact, each arrest, each court appearance, each report you write is a test. Today you move into a glass house. You will be tested.

So, Why Are You Here?

Perhaps, you didn't find police work. Perhaps, it found you. Perhaps, you are here because, like the sick child who grows up to be a doctor, some experience made a lasting impression on you. Perhaps, you want to make a difference in your community. Or, you are sick and tired of the crime and disorder in society and believe you can make a difference. Never let anyone tell you that you cannot make a difference. We all make differences. If, in 20 years on the job, you save one life, you have made a difference. If you catch only one rapist, you have made a difference. If you slow down just one speeder and keep one child from getting struck, you have made a difference. You may feel your contributions are insignificant in the big picture of life, but together, you make a huge difference. You are here because you can make that difference.

Do You Have the Courage to Police?

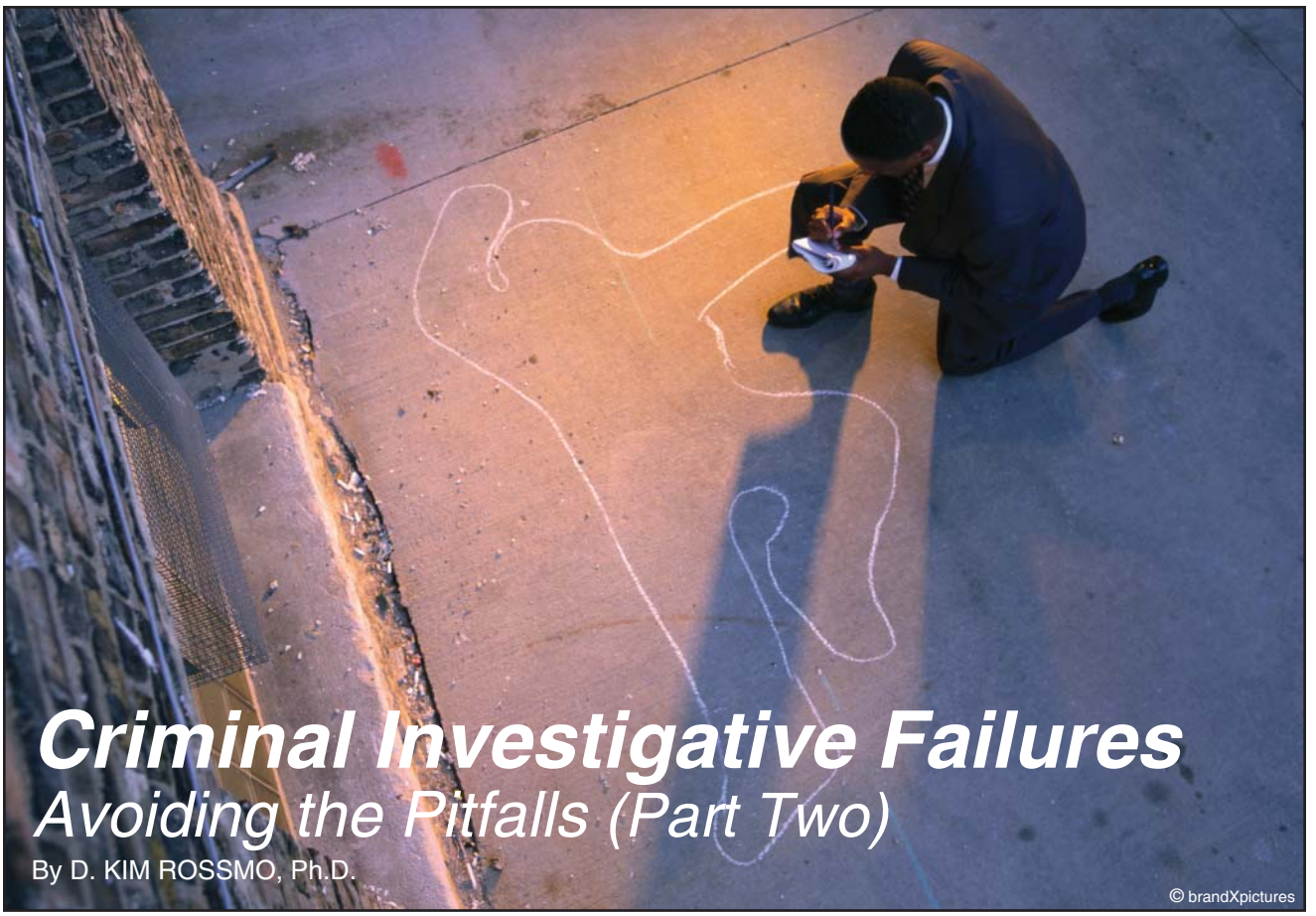
Fear is everywhere—in our culture, our society, and ourselves, and it cuts us off from everything. Be not afraid. Be not afraid to make a difference, to be a good cop, and to spend the rest of your lives learning to be better at what you do. Good policing comes from good people—those who are not afraid to be good police officers.

Few people will ever thank you for the job you do. So, let me be the first to thank each of you for the job you will do in the career you are about to enter. Congratulations, and good luck. ✦

Wanted: Notable Speeches

The *FBI Law Enforcement Bulletin* seeks transcripts of presentations made by criminal justice professionals for its Notable Speech department. Anyone who has delivered a speech recently and would like to share the information with a wider audience may submit a transcript of the presentation to the *Bulletin* for consideration.

As with article submissions, the *Bulletin* staff will edit the speech for length and clarity, but, realizing that the information was presented orally, maintain as much of the original flavor as possible. Presenters should submit their transcripts typed and double-spaced on 8 ½- by 11-inch white paper with all pages numbered. When possible, an electronic version of the transcript saved on computer disk should accompany the document. Send the material to: Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Madison Building, Room 201, Quantico, VA 22135.



Criminal Investigative Failures

Avoiding the Pitfalls (Part Two)

By D. KIM ROSSMO, Ph.D.

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Part one of this article focused on cognitive biases and how they can contribute to criminal investigative failures. Part two presents probability errors and organizational traps that can lead investigations astray. It also offers recommendations and additional strategies that investigators may find helpful.

PROBABILITY ERRORS

Probability and Psychology

Anyone who has spent a few hours watching people gamble will realize that probability is a difficult concept for the human mind. Individuals often use heuristics—and suffer from biases—when dealing with probability. Police officers find it particularly hard to think probabilistically. Because of their street experiences, they prefer black and white, rather than shades of gray. Probability errors in criminal justice most often occur in the forensic sciences but also can happen in criminal profiling.

Coincidences and the Law of Small Numbers

A common problem with probability results from looking for patterns in, or drawing inferences from, a small number of incidents. For example, an analyst examines the dates for a series of 15 street robberies and observes that none of the crimes occurred on a Thursday. Is this pattern meaningful? Probably not. With only 15 crimes, chances are at least one day of the week will be free of robberies.

Skeptics often say they do not believe in coincidences. However, when looking for patterns within large numbers of items (i.e., events, suspects), coincidences are inevitable.

The comparison of Presidents Kennedy and Lincoln provides a well-known example. The list of remarkable similarities is strictly the product of chance (with 43 U.S. presidents, 903 possible comparisons are possible) and cherry picking (noting similarities, while ignoring differences).

What role does coincidence play in major crime investigations? If enough suspects are looked at, by sheer chance, some will circumstantially appear guilty. A few people will just be in the wrong place at the wrong time. Efforts to solve a crime by "working backwards" (i.e., from the suspect to the crime, rather than from the crime to the suspect) are susceptible to errors of coincidence. If you look hard enough, you can usually find some sort of connection. These types of errors often are seen in the proffered "solutions" to such famous cases as Jack the Ripper.

Coincidences can be a trap when offender modus operandi and similar fact evidence are used for crime linkage purposes. Trawl search problems occur when only similarities, and not differences, are examined.[1] Comparisons of common similarities (e.g., vaginal intercourse in rape crimes) lack utility, while misspecifications of similarities can be misleading. Consider two juvenile murder strangulations involving body transportation and concealment. While the similar crime characteristics suggest a link, more detailed examination reveals important inconsistencies. One victim was a 3-year-old male, manually strangled, his body found in a dumpster 100 yards from his house. The other victim was a 14-year-old female, strangled with a rope, her body found dumped in a river 20 miles from her home.

Double Counting

Extracting two elements of a crime from a common source and then erroneously treating them as separate aspects can mislead a criminal investigation. A rumor heard from more than one person does not necessarily verify the information as both individuals may have received it from the same source. Consider a behavioral profile of a child murderer. Amongst other details, the profile estimates the offender's age and his vehicle type, derived from automobile insurance data. Using the profile, investigators evaluate two suspects—one matches both the age and vehicle criteria, and the other only the age. Who is the better suspect vis-à-vis the profile? Actually, they are equal. Derived from the age estimate, the vehicle type is not an independent profile element drawn from the crime scene (as opposed to a vehicle sighting by a witness). Treating age and vehicle type as two separate match points constitutes double counting.

Conjunction Fallacy

The conjunction fallacy occurs when investigators assign a higher probability to the

> ***"In major cases, particularly those involving large numbers of personnel and extending over long periods of time, internal rumors can pose a significant problem."***

Dr. Rossmo, a former detective inspector in charge of the Vancouver, British Columbia, Police Department's Geographic Profiling Section, is currently a research professor and director of the Center for Geospatial Intelligence and Investigation in the Department of Criminal Justice at Texas State University in San Marcos.

overlap of two events than to either event separately. Probabilities are combined by multiplying them together, resulting in a product smaller than either initial probability (given noncertainty).[2] Conjunction fallacies have occurred in DNA matching, offense-linkage analysis, and crime forecasting.[3] Imagine that a witness reports seeing a vehicle flee a nighttime gas station robbery in which the clerk was shot dead. He states that he had only a quick glimpse but is reasonably sure the vehicle was a gray domestic minivan. How much weight should be placed on this description?

This question has two parts. First, what is the probability the witness actually saw the offender's vehicle? In major crime cases, especially those involving significant publicity, the public's desire to help or become involved is high, but their information often proves unreliable. A generous assumption gives the witness a 75 percent chance of actually having seen the robber's vehicle. Second, how accurate is his vehicle description? The witness provides three descriptive elements. Assigning witness accuracy probabilities of 70 percent to the make, 90 percent to the type, and 60 percent to the color (under some streetlights, blue looks gray) puts the likelihood that the witness saw a gray American-made minivan at only 38 percent. The probability that the offender was driving such a vehicle is only 28 percent (the probability the witness actually saw the vehicle times the probability of witness accuracy). This does not mean his information is not valuable. Obviously, suspect vehicles that are gray domestic vans should be prioritized and investigated. The problem only occurs when other suspect vehicles (e.g., blue imported SUVs) are ignored.

Base Rates

A lack of understanding of base rates can lead to misinterpreting research findings and forensic results.[4] Consider the oft-quoted fact, "Serial killers are usually white males." While technically correct, at least for the United States, this statement is incomplete. To understand it properly, the relevant base rates also must be considered. Three different studies of serial murderers found black offender proportions of 16, 20, and 20 percent, and female offender proportions of 9, 10, and 16 percent. According to the 2000 census, the U.S. population is 75 percent white and 49 percent male. So, while disproportionately male, the only reason most serial killers in the United States are white is because most of the population is white. More important, all else being equal, serial killers are less likely to be white in predominantly black or Hispanic areas.

Errors of Thinking

Research has identified two errors related to the issue of probability within the court context, the prosecutor's fallacy and the defense attorney's fallacy.[5] The prosecutor's fallacy occurs when people equate the probability of the evidence given guilt with the probability of guilt given the evidence. Put simply, while all cows are four-legged animals, not all four-legged animals are cows. This error (known as transposing the conditional) can occur in both forensic science and behavioral profiling. This is illustrated by the investigation into two bomb explosions that killed 21 people and injured 182.[6] Police officers detained a group of men traveling to a funeral and had their hands examined for traces of nitroglycerine. A forensic scientist testified at their trial that he was "99 percent certain" the

defendants had handled explosives. It was later disclosed, however, that many other substances could produce positive test results, including nitrocellulose found in paint, lacquer, playing cards, soil, gasoline, cigarettes, and soap. The defendants had played a game of cards on the train shortly before their arrest. Their convictions were overturned on appeal, partly as a result of the forensic evidence being discredited because the scientist had transposed the conditional.

The defense attorney's fallacy occurs when evidence is considered in isolation, rather than in totality. This type of error happened during O. J. Simpson's preliminary hearing. The prosecution presented evidence that blood from the murder scene, when analyzed using conventional grouping techniques, matched the accused, with characteristics shared by 1 in 400 people. The defense argued that an entire football stadium could be filled with people in Los Angeles who also would match; therefore, the evidence was useless.[7] While the first part of the defense argument regarding the number of matches is correct, only a limited number of those people had relationships with the victims and even fewer had any reason for wanting to kill them. The probability of an individual filling all three categories (equal to the individual probabilities multiplied together) is very low. Consequently, the second part of the argument—that the evidence is useless—is incorrect.

ORGANIZATIONAL TRAPS

Inertia, Momentum, and Roller Coasters

Conservative in nature, law enforcement agencies can suffer from bureaucratic inertia, a lethargy or unwillingness to change, evolve, or act. Change is disruptive and requires effort, energy, time, and money. Most departments, however, have many competing demands with few, if any, spare resources. Inertia can slow an agency's response to a new crime problem, as the Green River Killer case demonstrated.[8] Police admitted that they had no idea what they were getting into when they began their investigation, which took 20 years to complete.

Organizational momentum, the inability to change direction in the midst of a major investigation, is the converse problem. To redirect and shift its focus from an established theory of a crime or a particular suspect is particularly difficult when an agency has to admit publicly that the original direction was wrong. But, staying the course in light of compelling evidence pointing in a new direction can prove catastrophic. Police must strike a balance between stability and responsiveness. The mistaken witness report of a suspect white van in the sniper attacks in the Washington, D.C., area serves as an example. "It begs the question, did we publish composite pictures because witnesses saw the white van, or did we see the white van because we published the pictures? We should've paid more attention to the description of the Caprice and given it as much creditability as the van, but we didn't. In hindsight, it was a mistake made in the emotion of the moment. But, with all that we had set in place, we should've done better."[9]

Detectives working high-pressure murder cases often refer to investigative roller coasters, the ups and downs resulting from the pursuit of prime suspects. A problem can occur if suspect "Jones" emerges during the investigation of prime suspect "Smith." Investigators

typically see the viability of a new suspect relative to existing ones, so if Smith is the best current suspect, then Jones is relegated to a secondary status. When Smith is cleared, what happens to Jones? At best, Jones stays a secondary suspect; at worst, he will be overlooked altogether. Often discovered in cold case murder investigations, such suspects are obvious to the fresh eyes of new observers not subject to the psychological and organizational pressures that may have affected the original investigators.

Red Herrings and Rumors

In high-profile cases, the constant media attention brings forth a flood of public information, some of it relevant, most of it not. During the 3 weeks of the Washington, D.C., sniper case, for example, authorities received 100,000 calls, and more than 500 investigators pursued 16,000 leads.[10] In such situations, the police run the risk of landing a red herring. Witness misinformation, compounded by organizational reluctance to accept that the witness may be wrong, has sent several high-profile investigations down the wrong path.[11]

Suspect vehicle sightings appear particularly problematic and include several infamous examples, such as the white box truck/van seen so often during the sniper shootings in the Washington, D.C., area (the shooters drove a blue sedan). In addition, some red herrings can result from mischief or greed. During the Yorkshire Ripper inquiry in England, investigators received three letters and a cassette tape from a person claiming to be the killer.[12] Experts analyzed the voice on the tape and concluded that the speaker likely came from the same area postmarked on the letters. The tape was not from the killer, however, and the focus on this location—75 miles north of where the real offender lived—hurt the investigation.

> ***"Fatigue, overwork, and stress, all endemic in high-profile crime investigations, also can create problems for police personnel."***

In major cases, particularly those involving large numbers of personnel and extending over long periods of time, internal rumors can pose a significant problem.[13] A solidified rumor is gossip that has hardened into "fact" and taken as such by the investigative team. Most vulnerable are detectives who later join a prolonged investigation and, therefore, receive most of their information secondhand.

Investigators need to outline their assumptions. If an assumption later turns out to be invalid, then everything following from it must be rethought. As the human mind does not automatically reevaluate information, specific organizational procedures must be established to address this issue. Documenting assumptions facilitates this process and protects investigations from "creeping credibility," which occurs when an idea or theory gains credence from the passing of time, rather than from supporting evidence. A possibility hardens into a probability and then crystallizes into "certain fact."

Investigation teams must understand their knowledge base. They can assess validity only if they know the data source. Otherwise, the information may be a solidified rumor or the product of creeping credibility. Some teams catalogue case information using three factors that can facilitate effective information sharing, allowing everyone (both present and future) to work from the same foundation.

1) What they know (facts).

2) What they think they know (theories or conjectures).

3) What they would like to know (key issues requiring additional data).

Strategies to Help Avoid Investigative Failures

- Encourage investigators to express alternative, even unpopular, points of view and assign the role of devil's advocate to a strong team member.
- Consider using subgroups for different tasks and facilitate parallel but independent decision making.
- Recognize and delineate assumptions, inference chains, and points of uncertainty; always ask, "How do we know what we think we know?"
- Obtain expert opinions and external reviews at appropriate points in the investigation.
- Conduct routine systematic debriefings after major crime investigations and organize a full-scale "autopsy" after an investigative failure.[23]
- Encourage and facilitate research into criminal investigative failures and how they might be prevented.

Ego and Fatigue

Ego, both personal and organizational, can prevent an investigator from adjusting to new information or seeking alternative avenues of exploration. For example, a homicide sergeant in a large metropolitan area told the author that his detectives could decide within 5 minutes of arriving at a crime scene who had committed the murder and would be correct 95 percent of the time. While impressive, the remaining 5 percent equates to more than one missed call every month. Therefore, detectives must have the flexibility to admit their mistakes and avoid falling into the ego trap inherent in usually being right. Stubbornness often coincides with ego and proves equally problematic.

Fatigue, overwork, and stress, all endemic in high-profile crime investigations, also can create problems for police personnel. Research has shown that sleep can significantly improve insightfulness.[14] "It's necessary to be slightly underemployed if you are to do something significant."[15] Tiredness dulls even sharp minds. Critical assessment abilities drop in overworked and fatigued individuals, who start to engage in what has been termed "automatic believing."

Groupthink

Groupthink, the reluctance to think critically and challenge the dominant theory, occurs in highly cohesive groups under pressure to make important decisions. First suggested after the disastrous Bay of Pigs invasion in Cuba,[16] the main symptoms of groupthink include three fundamental aspects.

1) Power overestimation: belief in the group's invulnerability (resulting in unwarranted optimism and risk taking); and belief in the morality of the group's purpose (leading to ignoring the ethical consequences of decisions).

2) Close-mindedness: group rationalizations; discrediting of warning signs; and negative stereotyping of the group's opponents (e.g., evil or stupid).

3) Uniformity pressures: conformity pressures (those who disagree with the dominant views or decisions are seen as disloyal); self-censorship (the withholding of dissenting views and counterarguments); shared illusions of unanimity (silence is perceived as consent, and an incorrect belief exists that everyone agrees with the group's decision); and self-appointed mind guards (individuals who elect to shield the group from dissenting information).

Groupthink has several negative outcomes that spell disaster for a major investigation. Victims of this trap selectively gather information and fail to seek expert opinions.[17] They

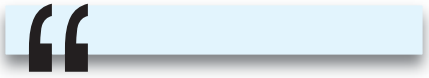
neglect to critically assess their ideas and examine few alternatives, if any, and do not develop contingency plans.

RECOMMENDATIONS

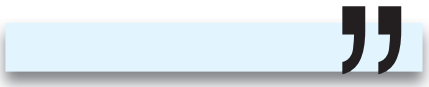
Police investigations can significantly benefit from the thoughts and opinions of independent experts. The British Home Office, frustrated over the lack of progress in the Yorkshire Ripper murder inquiry, formed an external review committee that included a civilian forensic scientist who studied the locations and times of the crimes and correctly concluded where the killer lived (despite the misleading letters and cassette tape mentioned earlier).[18]

Outside review also can play an important role. Police procedures in the United Kingdom require an independent review of unsolved homicide cases after 1 year.[19] This produces two results. First, knowledge of this policy prompts detectives to leave no possibilities unexplored. Second, external reviewers are more apt to notice mistakes and omissions. This is the same basis as scholarly peer review, a foundation of scientific research.

As a final warning, research has suggested that even when individuals are aware of these problems, they still find them difficult to overcome. The dangers are especially great in high-profile cases of horrific crimes, such as sex or child murders.[20] Prosecutors and judges, as well as police officers, can fall prey to these traps.[21] Training is an important first step, but insufficient by itself. Effort and vigilance also are required. Law enforcement agencies need to create formal organizational mechanisms to prevent these subtle hazards from derailing criminal investigations.



Police investigations can significantly benefit from the thoughts and opinions of independent experts.



CONCLUSION

Thankfully, most criminals are not masterminds, and, in many cases, the criminal investigation is a straightforward process. However, a major crime "whodunit" can be challenging and difficult. Certain factors identified with cognitive and organizational failures (low information levels, limited resources, and pressure to obtain quick results)[22] are all too common in these investigations.

The criminal investigation process plays an important and special role in countries governed by the rule of law. Its function is to seek the truth, "without fear or favor." That task, integral to both public safety and justice concerns, must be conducted in an unbiased and professional manner. When it is not, the result is unsolved crimes, unapprehended offenders, and wrongful convictions. Understanding what can go wrong is the first step toward preventing a criminal investigative failure. ✦

Endnotes

[1] D.M. Risinger and J.L. Loop, "Three Card Monte, Monty Hall, Modus Operandi and 'Offender Profiling': Some Lessons of Modern Cognitive Science for the Law of Evidence," *Cardozo Law Review* 24 (2002): 193-285.

[2] There is an assumption of independence of events.

[3] "Crime Analysis Challenge," *Crime Mapping News* 4, no. 3 (2002): 9-13.

[4] B. Robertson and G.A. Vignaux, *Interpreting Evidence: Evaluating Forensic Evidence in the Courtroom* (Chichester, England: John Wiley and Sons, 1995); and A. Tversky and D. Kahneman, "Evidential Impact of Base Rates," in *Judgment Under Uncertainty: Heuristics and Biases*, eds. D. Kahneman, P. Slovic, and A. Tversky (Cambridge, MA: Cambridge University Press, 1982), 153-160.

[5] Supra note 4 (Robertson and Vignaux).

[6] Supra note 4 (Robertson and Vignaux); and B. Woffinden, *Miscarriages of Justice* (London, England: Hodder and Stoughton, 1988).

[7] Supra note 4 (Robertson and Vignaux).

[8] C. Smith and T. Guillen, *The Search for the Green River Killer* (New York, NY: Penguin Books, 1991).

[9] B.J. Karem and C. Napolitano, "In a Room with Madness," *Playboy*, March 2003.

[10] Ibid.

[11] A. Campbell, *The Campbell Inquiry Report: Bernardo Investigation Review* (Toronto, ON: Government of Ontario, 1996).

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[13] Studies of rumor propagation have shown that as a rumor spreads, its dramatic components are exaggerated, while its qualifiers diminish or disappear altogether; see, T. Shibutani, *Improvised News: A Sociological Study of Rumor* (Indianapolis, IN: Bobbs-Merrill, 1966).

[14] U. Wagner, S. Gais, H. Haider, R. Verleger, and J. Born, "Sleep Inspires Insight," *Nature* 427 (2004): 352-355.

[15] Dr. James Watson, Nobel Laureate in Medicine and codiscoverer of DNA's molecular structure, commenting on the importance of unstructured time in thinking.

[16] Yale research psychologist Irving Janis.

[17] Department of Justice, Canada, FPT Heads of Prosecutions Committee Working Group, *Report on the Prevention of Miscarriages of Justice* (Ottawa, 2004).

[18] S.S. Kind, *The Scientific Investigation of Crime* (Harrogate, England: Forensic Science Services, 1987); and *The Sceptical Witness* (Harrogate, England: Hodology, 1999).

[19] While many other factors are involved, it is perhaps worth noting that homicide clearance rates in the United Kingdom are over 90 percent compared with 63 percent in the United States.

[20] R.J. Heuer, Central Intelligence Agency, Center for the Study of Intelligence, *Psychology of Intelligence Analysis* (Washington, DC, 1999).

[21] Supra note 17; and P. de C. Cory, *The Inquiry Regarding Thomas Sophonow* (Winnipeg, MB: Queen's Printer, 2001).

[22] P. Stelfox and K. Pease, "Cognition and Detection: Reluctant Bedfellows?" in *Crime Science: New Approaches to Preventing and Detecting Crime*, eds. M.J. Smith and N. Tilley (Cullompton, England: Willan Publishing, 2005), 191-207.

[23] For example, the Vancouver, British Columbia, Police Department assigned a deputy chief constable to review thoroughly what happened, as well as what failed to happen, after a problematic serial murder case.

Over the course of his 21-year policing career, the author worked assignments in organized crime intelligence, emergency response, patrol, and crime prevention. His interest in the subject of criminal investigative failures originates from various unsolved major crime cases for which he has consulted. Currently, he is working on a book on the topic. He thanks those detectives who willingly discussed what went wrong in their investigations and dedicates this article to them.

Snap Shot

Call of the Wild

The sound of sirens at the scene of an accident attracted and confused two coyotes.

Photos submitted by Peter A Marchica, III and taken in Joshua Tree, California.

Book Review

Controversies in Criminal Justice: Contemporary Readings, *by Scott H. Decker, Leanne Fiftal Alarid, and Charles M. Katz, Roxbury Publishing, Los Angeles, California, 2003*.

As a discipline, criminal justice is fraught with competing interests, priorities, and opinions, often further confounded by conflicting anecdotal and scientific evidence. The authors of *Controversies in Criminal Justice: Contemporary Readings* convey that message succinctly in the introduction: "There are two sides to every story." This compilation of criminal justice articles into a single volume presents some of the most contentious and hotly debated issues before policy makers and practitioners thus far.

Scott H. Decker, Leanne Fiftal Alarid, and Charles M. Katz take a unique approach to their text by presenting 11 thought-provoking criminal justice issues with contrasting views: one article favoring the argument and one opposed. This method gives the reader the ability to examine both positions, juxtaposed in an easy-to-read format. Thirty-two articles by some of the most respected authors in criminal justice are logically grouped into four parts: "The Nature of American Crime," "Law Enforcement and Community Policing," "Administering Criminal Law in the Courts," and "Punishment of Offenders." Within each section, the authors present issues that academics and practitioners have debated for some time, including legalizing drugs, the influence of human intelligence and class structure on crime, terrorism, how to reduce crime, the existence of racial profiling, and strategies for punishment.

When considering the legalization of drugs, James Q. Wilson argues how much worse the epidemic would be had national drug-control policy not been vigorously pursued. By contrast, Ethan A. Nadelmann maintains that current policies should be abandoned in favor of alternatives that would reduce the costs and consequences of drugs, including legalization.

One of the most sensitive debates over the last 20 years has been whether human intelligence and class structure contribute to crime. One of the first sources for such a theory came from *The Bell Curve: Intelligence and Class Structure in American Life*, where Richard J. Herrnstein and Charles Murray suggested that low IQ influences the crime picture. Today, Francis T. Cullen, Paul Gendreau, G. Roger Jarjoura, and John Paul Wright dissect Herrnstein and Murray's research and point to fatally flawed methods that do not advance science nor do they prove that low IQ causes crime, as previously believed. One of the biggest ethical questions surrounding this is, If IQ or class structure *does* predict who will become a criminal, what do we do about it?

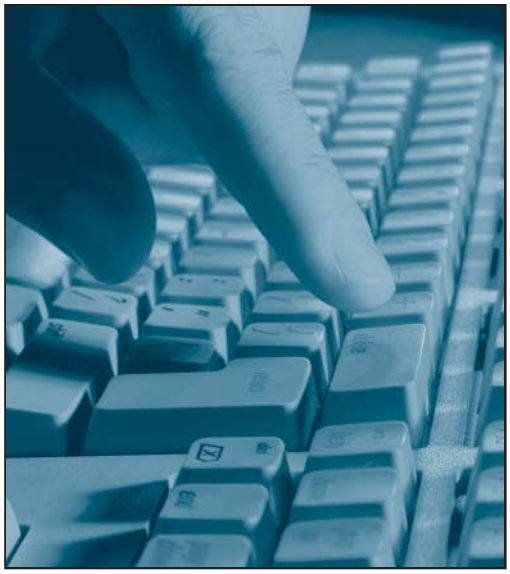
Another interesting assertion concerns how to approach reducing crime through policing strategies. George L. Kelling and William J. Bratton suggest that a policy of strict attention to nuisance offenses (the broken windows theory), centralized data collection and analysis, and officer empowerment can lead to substantial crime reductions. From the opposing viewpoint, Chris Cunneen suggests that zero-tolerance policing and the New York City experience created more problems than the crime reductions were worth: increased tension between police and minority groups, a lack of citizen confidence, and increased citizen complaints of police use of force. This begs the question, If problems are associated with zero-tolerance policing, should they be accepted as necessary collateral damage, or do they erode fundamental civil liberties?

Each part of the text opens with a brief discussion of the issue and introduces the debate, followed by critical-thinking questions and Web sites for further research. The authors emphasize the most salient part of the text, which should guide readers as they formulate their judgment: logic. Arguments that are logical, supported by evidence, and remain consistent produce a cogent and defensible position. The process of logic can lead to better solutions for complex criminal justice issues. However, the authors do not draw answers or conclusions from the articles. Indeed, the conclusions are left to readers to interpret or explore further. This is one of the primary aims of the text: to ensure that readers consider different points of view and ask the questions, "What about...?" "What if...?" or "Have you considered...?" All of the articles first appeared in respected academic journals or government publications, which lends credibility to their content.

This anthology is an excellent addition to any college course on policing, especially as an introduction to criminal justice. Police practitioners and organized police groups, such as those that adopt policy positions, will find it useful, particularly as a reference guide to augment policy positions and to assist with lobbying endeavors.

Reviewed by
Captain Jon M. Shane (Ret.)
Newark, New Jersey, Police Department

The *Bulletin's* E-mail Address



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We would like to know your thoughts on contemporary law enforcement issues. We welcome your comments, questions, and suggestions about the magazine. Please include your name, title, and agency on all e-mail messages.

Also, the *Bulletin* is available for viewing or downloading on a number of computer services, as well as the FBI's home page. The home page address is *http://www.fbi.gov.*

Bulletin Reports

Identity Theft

The Office of Community Oriented Policing Services (COPS) presents *Identity Theft*, which addresses identity theft-related crimes committed in the United States. Divided into four main sections, the guide describes the problem, reviews factors that increase the risks of it happening, identifies a series of questions to assist in analyzing a local problem, and presents responses and what is known from evaluative research and police practice. A firm understanding of this issue will enable agencies to tailor an effective response strategy and measure its effectiveness. This report is available online at *http://www.cops.usdoj.gov/mime/open.pdf?Item=1271* or by contacting the National Criminal Justice Reference Service at 800-851-3420.

Juvenile Crime

The National Institute of Justice (NIJ) presents *Co-Offending and Patterns of Juvenile Crime*. Juveniles often commit crimes in pairs or groups, a process known as co-offending. An NIJ-sponsored study of delinquents in Philadelphia, Pennsylvania, found several patterns related to juvenile co-offending. The researchers linked co-offending with increased risks for recidivism and violence. Interaction among delinquent peers seems to instigate crimes and escalate their severity. The youngest offenders were more likely to co-offend and to become violent if their earliest crimes were committed with violent offenders, even if those crimes were not violent. The researchers recommend early intervention targeting very young offenders, especially co-offenders, although more research is needed. But, they also caution that some interventions may enhance the effects of co-offending by placing youths in groups that unintentionally provide negative peer learning. This report is available online at *http://www.ojp.usdoj.gov/nij/pubs-sum/210360.htm* or by contacting the National Criminal Justice Reference Service at 800-851-3420.

Courts

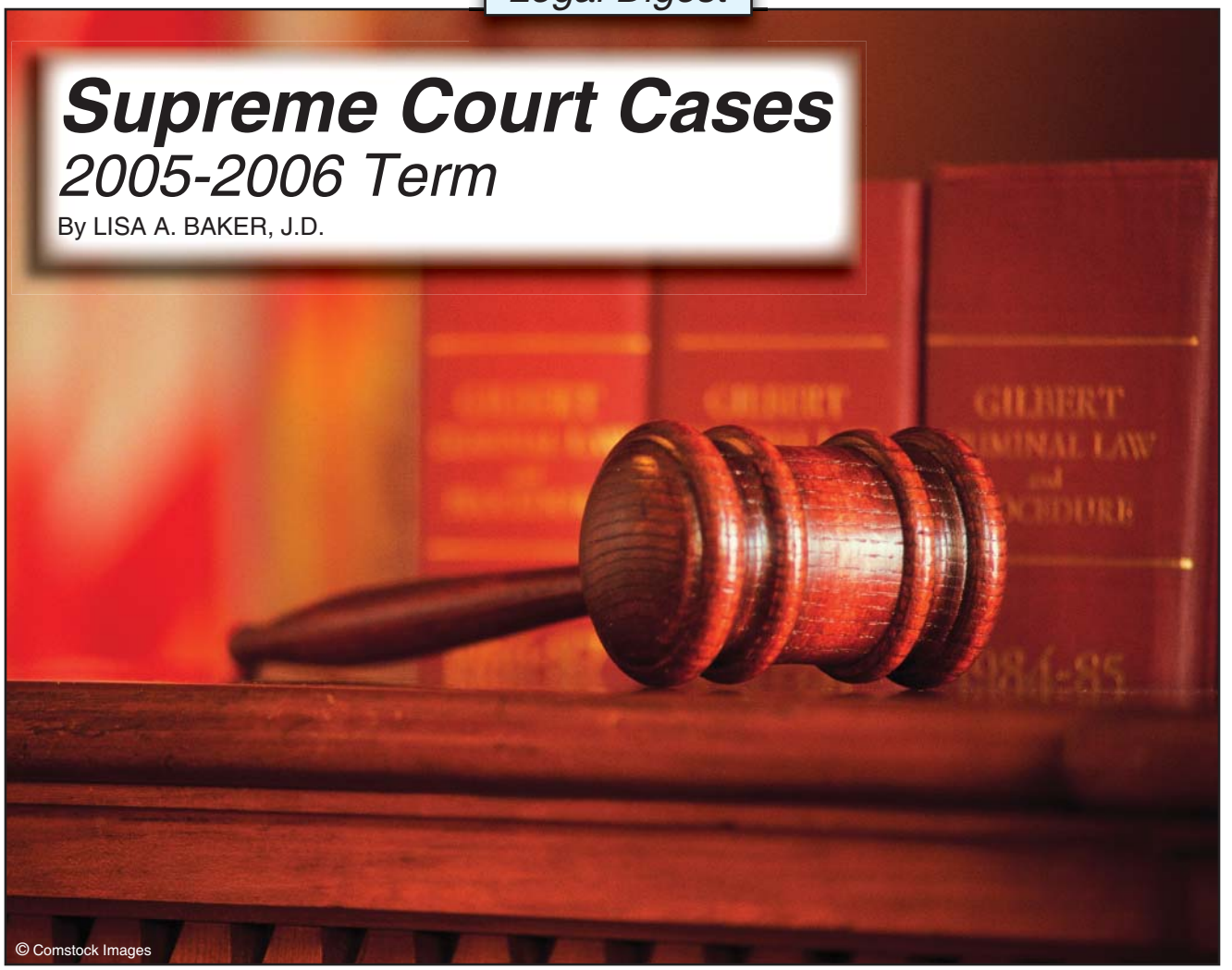
The Bureau of Justice Statistics presents *Prosecutors in State Courts, 2005*, which presents findings from the 2005 National Survey of Prosecutors, the latest in a series of data collections about 2,300 state court prosecutors' offices in the United States that tried felony cases in state courts of general jurisdiction. This study provides information on the number of staff, annual budget, and felony cases closed for each office. Information also is available on DNA evidence use, computer-related crimes, and terrorism cases prosecuted. Other survey data include special categories of felony offenses prosecuted, types of nonfelony cases handled, number of felony convictions, number of juvenile cases proceeded against in criminal court, and work-related threats or assaults against office staff. Highlights include the following: at least two-thirds of the state court prosecutors had litigated a computer-related crime, such as credit card fraud, identity theft, or transmission of child pornography; approximately one-quarter of the offices participated in a state or local task force for homeland security, and one-third reported that an office member attended training on homeland security; and most prosecutors relied on state-operated forensic laboratories to perform DNA analysis, with about a third also using privately operated DNA labs. This report is available online at *http://www.ojp.usdoj.gov/bjs/abstract/psc05.htm* or by contacting the National Criminal Justice Service at 800-851-3420.

Crimes Against Children

The Office of Community Oriented Policing (COPS) presents *Child Pornography on the Internet*. This guide describes the problem and reviews the factors that increase the risks of Internet child pornography. It then identifies a series of questions that may assist in the analysis of the problem and reviews responses based on evaluative research and police practice. This report is available online at *http://www.cops.usdoj.gov/mime/open.pdf?Item=1729* or by contacting the National Criminal Justice Reference Service at 800-851-3420.

Supreme Court Cases
2005-2006 Term

By LISA A. BAKER, J.D.



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The 2005-2006 U.S. Supreme Court term included several cases addressing a variety of constitutional, criminal, procedural, and employment-related issues of interest to law enforcement officers and managers. One case resolved whether law enforcement officers may search based on consent when one person with lawful authority provides consent but another person who also has authority over the place to be searched is physically present and refusing to provide consent. The Court also considered the constitutionality of a warrantless entry into a residence based on a reasonable concern for the safety of an occupant inside the residence, rejecting the notion that in evaluating the reasonableness of the officer's actions, courts should consider whether the officer's motives truly were to render assistance or were merely a pretext to investigate criminal activity. In another case, the Court considered the constitutionality of warrantless searches of individuals released on parole when undertaken without any suspicion of criminal activity. In two separate cases, the Supreme Court considered the appropriate use of the exclusionary rule, refusing to apply it to instances where law enforcement fails to comply with the knock and announce

requirement prior to making a forcible entry and to statements made by an individual when not afforded notice of the right to consular notification under Article 36 of the Vienna Convention on Consular Affairs. In two employment-related cases, the Court further clarified what speech and expressive conduct would qualify for protections afforded government employees under the First Amendment and clarified what would amount to retaliation within the anti-discrimination in employment provisions of Title VII of the Civil Rights Act of 1964.

This article provides a brief synopsis of these cases. As always, state and local law enforcement agencies must ensure that their own state laws and constitutions have not provided greater protections than the U.S. constitutional standards.

Georgia v. Randolph, 126 S. Ct. 1515 (2006)

According to the Supreme Court's ruling in this case, when officers are presented with a situation wherein two parties, each having authority to grant consent to search premises they share, but one objects over the other's consent, the officers must adhere to the wishes of the nonconsenting party. Officers responded to a domestic dispute call and were met by the husband and wife who resided at the residence. The wife advised the officers that her husband was a drug user and evidence of his drug use was in the residence. One of the officers asked the husband for consent to search the residence and was denied. The officer then turned to the wife and asked for her consent, which she provided. She subsequently led the officers to an upstairs bedroom where they observed a powdery white substance they believed to be cocaine.[1] The officers then obtained a search warrant and seized additional evidence of drug use.

The defendant-husband moved to suppress the items seized, arguing that they were the product of an unlawful search as he had objected to the search over his wife's consent. The Georgia Supreme Court held that the consent provided by the wife was not valid in the face of his objection.[2] The U.S. Supreme Court agreed to hear the case to resolve the split within the judicial system concerning the validity of consent granted by one party but objected to by another who is physically present and expressing his or her objection.[3]

Special Agent Baker is chief of the Legal Instruction Unit at the FBI Academy.

In agreeing with the Georgia Supreme Court, the U.S. Supreme Court reasoned that the Fourth Amendment should not be interpreted in a manner that ignores the privacy expectation of an individual asserting his or her rights while police attempt to obtain consent to search from another. In cases where a party with authority to give consent to search is physically present and objecting to the search, law enforcement must comply with his or her wishes. The Court took care, however, to point out that this principle applies to evidentiary

searches based on consent as opposed to situations where exigent circumstances exist that may justify a warrantless entry or when evidence may be at risk for destruction.[4]

***Brigham City v. Stuart*, 126 S. Ct. 1943 (2006)**

Law enforcement authority to make a warrantless entry into a residence to assist individuals seriously injured or under threat of such harm was addressed in *Brigham City v. Stuart.* In this case, police officers responded to a call reporting a loud party occurring at a residence. Upon arriving at the scene, the officers heard shouting and what sounded like an altercation from inside the residence. After approaching the front of the house and looking in the front window and seeing nothing, the officers concluded that the fight was occurring in the back of the house. The officers walked around to the back and saw two juveniles drinking in the backyard. At this point, they were able to see through a back screendoor four adults attempting to restrain a juvenile. A struggle was underway and punches were being exchanged. An officer proceeded to open the door and announce the officers' presence. The officers brought the situation under control. The occupants of the house were eventually arrested for intoxication, disorderly conduct, and contributing to the delinquency of a minor.

The defendants filed a motion to suppress the evidence the officers found while inside the residence, arguing that the initial entry into the residence violated the Fourth Amendment prohibition against unreasonable searches and seizures. The motion was granted and the evidence was suppressed.[5] On appeal to the Supreme Court of Utah, the court agreed with the defendants and held that the officers' entry into the residence violated the Fourth Amendment. The Utah court concluded that the altercation was insufficient to trigger the "emergency-aid-doctrine" as the officers did not have sufficient information to conclude that serious injury or death was occurring. Additionally, the court concluded that the officers' purpose for entering the residence was motivated by a desire to arrest the occupants as opposed to a desire to help an injured person.[6] The U.S. Supreme Court agreed to hear the case in light of the differing judicial opinions concerning the appropriate standard governing warrantless entries by law enforcement in emergency situations.[7]

The defendants in this case agreed with the fundamental authority of law enforcement to engage in a warrantless entry to render emergency assistance to an injured person or protect an individual from imminent harm.[8] The argument the defendants made to the Supreme Court was that the officers were motivated not out of a desire to render aid but, instead, to arrest individuals. The Supreme Court rejected this argument, reaffirming its position that an officer's actions should be viewed under the Fourth Amendment without regard to any subjective beliefs or desires of the officer. [9] As long as the officers' actions were objectively reasonable, the Fourth Amendment is not violated. As stated by the Court:

> It therefore does not matter here—even if their subjective motives could be so neatly unraveled—whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence.[10]

The Supreme Court also determined that the conduct that the officers were responding to when entering the home—ongoing violence—was serious enough to justify the warrantless entry, rejecting the defendants' argument that it did not rise to a level of seriousness that would justify this response. Overall, the officers' entry was determined to be "plainly reasonable under the circumstances."[11] As stated by the Court:

> Nothing in the Fourth Amendment required them to wait until another blow rendered someone 'unconscious' or 'semi-conscious' or worse before entering. The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided.[12]

***Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006)[13]**

In this case, the Supreme Court considered whether suppression of a confession is the appropriate remedy for a violation of Article 36 of the Vienna Convention on Consular Relations (VCCR).[14] Article 36 of the VCCR affords a foreign national protection from authorities when arrested or detained in a foreign country by requiring that country to notify the consular officer of the detainee's home country of the action taken against the individual and to inform the individual without delay of the right to speak with the consular officer.

The defendant, Moises Sanchez-Llamas, a Mexican national, was involved in a gunfight with police officers in which one of the officers was shot in the leg. Police arrested Sanchez-Llamas, provided him with his *Miranda* rights in both English and Spanish, which he agreed to waive, and interviewed him with the aid of an interpreter. During the course of the interview, he made numerous incriminating statements. Prior to his trial, the defendant moved to suppress the statements on the grounds that law enforcement failed to advise him of his right to consular notification as set forth in Article 36 of the VCCR.[15] The Oregon Supreme Court affirmed the lower courts' denials of the defendant's motion to suppress.[16] The U.S. Supreme Court agreed to hear the case.[17]

In an opinion authored by Chief Justice Roberts, the Supreme Court rejected the defendant's claim that suppression of evidence is the proper remedy for a violation of Article 36 of the VCCR. The Court initially noted that Article 36 does not set forth specific remedies for a violation of its provisions.

Commenting on whether the exclusionary rule is the proper remedy, the Supreme Court discussed how exclusively American the concept of suppression of evidence is as compared to other participating nations, stating, "[i]t would be startling if the Convention were read to require suppression."[18] The Court also rejected the defendant's argument that suppression is appropriate as a matter of the Court's "authority to develop remedies for the enforcement of federal law in state-court criminal proceedings."[19] The Court stated that any authority to create a judicial remedy for the violation of a treaty must lie in the treaty itself. If it were to require suppression of the statements obtained in violation of the consular notification requirement, the Court would, in effect, be supplanting the terms of the VCCR as ratified by the Senate and would, by extension, be imposing a rule onto the states through lawmaking of its own.[20]

The Court also rejected the defendant's assertion that suppression of his statement was the appropriate remedy for a violation of Article 36 of the VCCR as an extension of *U.S.* law. Rejecting this assertion, the Supreme Court commented, "[b]ecause the rule's social costs are considerable, suppression is warranted only where the rule's 'remedial objectives are thought most efficaciously served.'"[21] The remedial objectives served by the application of the exclusionary rule focus on preventing the government from gaining an unfair advantage by the use of evidence seized in violation of constitutional rights. Even in the few instances in which the exclusionary rule was used in response to statutory violations, the statute at issue implicated Fourth and Fifth Amendment rights, and the violation aided the government's evidence-gathering efforts. The Court noted that violations of Article 36 are not likely to provide the government with a practical advantage when interviewing an individual. Thus, according to the Court, "[s]uppression would be a vastly disproportionate remedy for an Article 36 violation."[22] The Court continued by stressing that diplomatic channels should be the primary means by which protections afforded by Article 36 are secured.

Samson v. California, 126 S. Ct. 2193 (2006)

In *Samson v. California*, the Supreme Court determined that suspicionless searches of parolees by law enforcement officers are reasonable under the Fourth Amendment. In this case, the defendant was on parole when confronted by a local police officer. According to California law, every prisoner eligible for release on state parole agrees "...in writing to be subject to search and seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause."[23] A police officer with the San Bruno Police Department observed the defendant walking in town and stopped him, believing there was a warrant out for his arrest. The officer also was aware that the defendant was out on parole. Resolving the warrant issue (there was no outstanding warrant), the officer went ahead and searched the defendant pursuant to the authority set forth in the above-quoted statutory provision. The officer found a container in the defendant's pocket. Inside the container, the officer discovered methamphetamine and subsequently arrested him.

The defendant challenged the search of his person and the seizure of the contraband, asserting that the suspicionless search violated the reasonableness principle of the Fourth

Amendment. In upholding the search, the Supreme Court concluded that the governmental interests at stake in monitoring individuals released on parole outweigh the already reduced privacy interests of the parolee.[24] The Court commented that parole falls on a continuum of state-imposed punishment more severe than probation, which the Supreme Court previously held subjected an individual to lesser privacy expectations.[25] Given that parole is more akin to incarceration than probation, the government's interests in regulating and monitoring the conduct of the parolee are even greater than the case with probationers. Thus, the suspicionless search in the case of a parolee was determined to be consistent with the Fourth Amendment.

***Hudson v. Michigan*, 126 S. Ct. 2159 (2006)**

In this case, the Supreme Court considered whether the application of the exclusionary rule is the appropriate remedy to apply when law enforcement fails to comply with the knock and announce requirement when making a forcible entry. In concluding that the suppression of evidence is not the appropriate remedy to apply, the Court emphasized that the knock and announce requirement is not directly related to the search and seizure that occurs once officers make entry into a residence. Rather, the interests furthered by the knock and announce requirement relate to protecting law enforcement and property, as well as to providing individuals advance notice of the government's entry, as opposed to the authority to search and seize items once inside the residence.[26] Furthermore, the cost to society if exclusion of evidence is appropriate is too great when compared to the relative harm involved. Officer safety would be compromised as officers may wait unnecessarily long prior to making an entry, and evidence could be lost either by criminals destroying it waiting for law enforcement to enter or by the court's decision to exclude it from trial.[27] When calling into question law enforcement conduct with regard to failure to comply with the knock and announce requirement, individuals may turn to possible civil remedies, as well as the increased professionalism of law enforcement agencies when it comes to internal discipline.[28]

***Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006)**

In another First Amendment employee speech case originating out of the Ninth Circuit Court of Appeals, the Supreme Court again was presented with an opportunity to clarify what speech and expressive conduct constitutes a matter of public concern. In *City of San Diego v. Roe*,[29] the Supreme Court held that for employee speech to amount to a matter of public concern, courts should examine whether the speech was the subject of legitimate news interest or value to society. If the speech or expressive conduct does not meet this threshold, no further scrutiny is necessary as there is no First Amendment protection afforded the employee. In *Garcetti v. Ceballos*, an assistant

district attorney (ADA) claimed that he was retaliated against for a memorandum he wrote asserting that a police officer's affidavit for a search warrant in a criminal case contained serious misrepresentations. He later expressed his concerns in a hearing before the court on the defense attorney's motion attacking the search.

The ADA brought an action under Title 42, U.S. Code, Section 1983, asserting that he suffered adverse employment consequences as a result of preparing the memorandum and speaking out on the matter. The government moved to dismiss his claim, arguing that the First Amendment did not shield him from adverse consequences as his conduct did not amount to a matter of public concern. The Ninth Circuit agreed with the ADA's claim and sent the case back for further analysis under the balancing of interests test to determine whether the First Amendment was violated.[30] The Supreme Court agreed to hear the government's appeal.[31]

The Supreme Court reversed the Ninth Circuit, holding that the First Amendment does not protect a public employee from adverse employment actions when the statements made are consistent with the employee's official duties. As the ADA's statements were made as part of his official responsibilities, the First Amendment does not shield him from employer action.[32] The Court expressed concern that any other result "...would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business."[33]

While acknowledging the importance of exposing governmental inefficiency and corruption is of great significance in our society, the Court noted the availability of the "...powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing."[34]

***Burlington Northern v. White*, 126 S. Ct. 2669 (2006)**

In this case, the Supreme Court held that the antiretaliation provision within Title VII of the Civil Rights Act of 1964 is not limited to actions only related to employment or that occur at the workplace. Rather, it encompasses any employer actions materially adverse to a reasonable employee or applicant as opposed to a substantive violation of the antidiscrimination provisions of Title VII. Substantive violations relate to the terms, conditions, and privileges of employment, meaning those actions that are employment-related or those occurring at the workplace.[35] This resolved a split of opinion within the Federal Circuit Courts of Appeals regarding the scope of the antiretaliatory provision. For example, the Sixth Circuit Court of Appeals in the case below agreed with the Fourth and the Third Circuits in ruling that a close relationship between the retaliatory action and employment must exist, and the employee must establish that an adverse employment action was taken, which was defined as a "materially adverse change in the terms and conditions of employment."[36] The Supreme Court disagreed with this restrictive interpretation, concluding that the goal of the substantive antidiscrimination provision cannot be achieved by focusing only on retaliatory actions and harm that concern employment and the workplace.[37] As stated by the Court, "[a]n employer can effectively retaliate against an employee by taking actions not directly

related to his employment or by causing him harm *outside* the workplace."[38]

The Court also addressed the scope of the antiretaliation provision, holding that it did not extend to all forms of retaliation but, rather, to those actions that are *materially* adverse, meaning it might have "dissuaded a reasonable worker from making or supporting a charge of discrimination."[39] The Court emphasized the importance of material adversity in distinguishing instances of conduct that may be more trivial in nature and, thus, not actionable under Title VII. As stated by the Court:

> An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.[40]

The key factor according to the Court is whether the retaliatory conduct would deter a reasonable worker from pursuing a claim of discrimination.

Conclusion

This article has discussed several cases from the recently completed term of the Supreme Court. Appropriate personnel in law enforcement departments need to be familiar with these rulings. While the announced docket for the upcoming 2006-2007 term does not appear to include the same number of law enforcement-related issues, the Court will continue to accept cases for consideration when the term commences. Any decisions of interest will be digested following the conclusion of the term on June 30, 2007. ✦

Endnotes

[1] 126 S. Ct. 1515, 1519 (2006).

[2] 278 Ga. 614; 604 S.E.2d 835 (2004).

[3] 126 S. Ct. at 1520, *citing United States v. Morning*, 64 F.3d 531 (9th Cir. 1995); *United States v. Donlin*, 982 F.2d 31 (1st Cir. 1992); *United States v. Hendrix*, 595 F.2d 883 (C.A.D.C. 1979); *United States v. Sumlin*, 567 F.2d 684 (6th Cir. 1977); *Love v. State*, 355 Ark. 334, 138 S.W.3d 676 (2003); *Laramie v. Hysong*, 808 P.2d 199 (Wyo. 1991); *State v. Leach*, 113 Wash.2d 735, 782 P.2d 1035 (1989). The Supreme Court also emphasized that the situation presented in *Randolph* differs significantly from that of an earlier co-occupant consent case, *United States v. Matlock*, 415 U.S. 164 (1974). In *Matlock*, a co-occupant consented to a search of shared premises. The consent was held to be valid even though the party against whom the evidence was used likely would have objected to the search. The critical difference between *Matlock* and *Randolph* is the physical presence of the nonconsenting partyer in *Randolph.*

[4] 126 S. Ct. 1525-1526.

[5] *Brigham City v. Stuart*, 57 P.3d 1111, 2002 UT App. 317 (2002).

[6] *Id.*, 122 P.3d 506, 2005 UT 13 (2005).

[7] 126 S. Ct. 979 (2006).

[8] *Id.* at 1948.

[9] *Brigham City* at 1948, *citing Bond v. United States*, 529 U.S. 334 (2000); *Whren v. United States*, 517 U.S. 806 (1996).

[10] *Id.* at 1948.

[11] *Id.* at 1949.

[12] *Id.*

[13] *See also* the companion case and opinion, *Bustillo v. Johnson*, 126 S. Ct. 2669.

[14] The VCCR was drafted in 1963 with the purpose of promoting friendly relations among nations. It consists of 79 articles regulating consular activities. At present, 170 countries have signed the VCCR.

[15] 126 S. Ct. 2676. He also argued that the statements were involuntarily provided. This alternative theory of suppression was not before the Supreme Court.

[16] *Cert. granted*, 126 S. Ct. 620 (2005).

[17] 126 S. Ct. at 2678.

[18] *Id.*

[19] *Id.* at 2679, *quoting* Reply Brief for Petitioner in No. 04-10566, p.11.

[20] *Id.* at 2679.

[21] *Id.* at 2680, *quoting United States v. Leon*, 468 U.S. 897, 908 (1984), *quoting*

United States v. Calandra, 414 U.S. 338, 348 (1974).

[22] *Id.* at 2681.

[23] *Samson v. California*, 126 S. Ct. 2193, 2196 (2006), *quoting* Cal. Penal Code Ann, § 3067(a) (West 2000).

[24] *Id.* at 2197.

[25] *Id.* citing *United States v. Knights*, 534 U.S. 112 (2001). In *Knights*, the Supreme Court upheld a warrantless search of a probationer's apartment based on suspicion that he had been involved in a series of incidents of arson.

[26] 126 S. Ct. 2159, 2164-2165.

[27] *Id.* at 2166.

[28] *Id.* at 2169.

[29] 125 S. Ct. 521 (2004).

[30] *Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2004).

[31] *Cert. granted*, 125 S. Ct. 1395 (2005).

[32] 126 S. Ct. 1959.

[33] *Id.* at 1961.

[34] *Id.*

[35] Title VII of the Civil Rights Act of 1964 prohibits employment discrimination against any individual on the basis of race, gender, religion, and national origin in the terms, conditions, and privileges of employment. *See* 42 U.S.C. § 2000e-2(a). The antiretaliation provision prohibits discrimination against individuals involved in the pursuit of a claim of discrimination. *See* § 2000e-3(a).

[36] *Burlington Northern v. White*, 126 S. Ct. 2405, 2410 (2006), *quoting Burlington Northern v. White,* 364 F.3d 789, 795 (6th Cir. 2004).

[37] *Id.*, siding with the Seventh Circuit and District of Columbia Courts of Appeals. *See Washington v. Illinois Department of Revenue*, 420 F.3d 658 (7th Cir. 2005); *Rochon v. Gonzales*, 438 F.3d 1211 (C.A.D.C. 2006).

[38] *Id.* [emphasis supplied].

[39] *Id.* at 2415, *quoting Rochon v. Gonzales*, 438 F.3d 1211, 1219 (C.A.D.C. 2006).

[40] *Id.*

Law enforcement officers of other than federal jurisdiction interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.

The Bulletin Notes

Law enforcement officers are challenged daily in the performance of their duties; they face each challenge freely and unselfishly while answering the call to duty. In certain instances, their actions warrant special attention from their respective departments. The *Bulletin* also wants to recognize those situations that transcend the normal rigors of the law enforcement profession.

Officer Leyboldt

While on patrol, Officer Fred Leyboldt of the Suffolk County, New York, Police Department responded to a call of a water main break. When he arrived, Officer Leyboldt saw a fireman step into a sinkhole, becoming submerged in freezing water; he was weighted down by his gear and unable to either free himself or touch the bottom with his feet. Officer Leyboldt immediately entered the surrounding standing water, grabbed the fireman by his wrist, and pulled him to safety. The quick response of Officer Leyboldt saved the fireman from serious injury or death.

Deputy Hickam

Deputy Buchholz

Deputies Jason Hickam and Jim Buchholz of the Marion County, Oregon, Sheriff's Office responded to a fire at an apartment complex. Upon arrival, they found that one of the buildings, containing nine residences, had flames coming out of the roof. Deputy Hickam advised dispatch of the severity of the situation and indicated that he and Deputy Buchholz were going to begin evacuations. Knowing that fire authorities were several minutes from the scene, the deputies began kicking down doors and entering apartments to help residents to safety. The fire continued to spread fast; people were jumping from their residences and flames erupted around the deputies during their efforts. The quick, selfless actions of Deputies Hickam and Buchholz saved many lives.

Nominations for the ***Bulletin Notes*** should be based on either the rescue of one or more citizens or arrest(s) made at unusual risk to an officer's safety. Submissions should include a short write-up (maximum of 250 words), a separate photograph of each nominee, and a letter from the department's ranking officer endorsing the nomination. Submissions should be sent to the Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Madison Building, Room 201, Quantico, VA 22135.

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Patch Call

The city of Chillicothe, Missouri, established in 1837, derives its name from the Shawnee Indian term for "our big town." The patch of its police department features the city seal, which depicts the community's involvement in agriculture and industry.

The patch of the South Windsor, Connecticut, Police Department features an American eagle carrying the scales of justice; on one of its outstretched wings are the American, state, and town flags. The town seal also is displayed.